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Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 130 .

JAMES V. MARTIN,

Petitioner,

vs.

COMMISSIONER OF PATENTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

ARTHUR W. PROCTER,
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CALEB A. HARDING,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States.

OCTOBER TERM, 1951.

No. .

JAMES V. MARTIN,

Petitioner,

vs.

COMMISSIONER OF PATENTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, James V. Martin, prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals entered March 18, 1952, affirming the decision of the Commissioner of Patents dated August 8, 1951, denying the application of petitioner for an extension of letters patent #2068300 pursuant to Public Law 598, 81st Congress (2nd Session), 35 U. S. C. 115.

The certified transcript of the record in this case is furnished herewith in accordance with Rule 42 of the Rules of this Court.

The Decision Below.

The majority decision is printed in the record (R. 67-74). Judge O'Connell dissented. His dissenting opinion is printed in the record (R. 74-81).

Jurisdiction.

The judgment of the United States Court of Customs and Patent Appeals was entered March 18, 1952. The jurisdiction of the Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. 1256.

The Questions Presented.

The questions presented are:

Does Public Law 598, 81st Congress (2nd Session), 35 U. S. C. 115, extending the life of letters patent of any person who served honorably in the military or naval forces of the United States at any time between December 7, 1941 and September 2, 1945, apply to any person who served honorably in the ships of the United States Merchant Marine when such ships were operating under control of the United States Navy, allocated to the United States Navy to carry military cargo and personnel for the account of the Navy.

Summary Statement of the Matter Involved.

These facts are undisputed:

The petitioner was issued a commission by the United States Maritime Service under regulations prescribed by the War Shipping Administration which

was established in the Executive Office by the President by Executive Order 9054 dated February 7, 1942 (R. 9, 21).

Petitioner took an oath of office similar to the oath taken by an officer in the United States Coast Guard (R. 22). As an officer in the United States Maritime Service, he wore the prescribed uniform (R. 22).

Petitioner served as Chief Mate of the S. S. "Clark Howell" between October 31, 1944, and November 24, 1944, in a voyage from Baltimore, Maryland, to San Pedro, California (R. 6B-7).

Petitioner served as First Officer with the Army Transportation Corps, the San Francisco Port of Embarkation, Fort Mason, California, from January 8, 1945, to January 18, 1945 (R. 7).

Petitioner also served as Master of the S. S. "Mathew Thornton" from January 18, 1945, to July 23, 1945, on two round trip voyages to the Marianas Islands, including Guam, Saipan and Tinian, during which time the vessel was owned by the United States represented by the War Shipping Administration under general agency operation by the Hammond Steamship Co. and allocated to the United States Navy to carry military cargo and personnel for the account of the Navy (R. 8, 9, 19, 20, 23, 24).

Petitioner took the same oath as regular Navy personnel and had regular Navy gun crews under his command including a First Lieutenant in the regular Navy (R. 19).

Petitioner was subject to all the air, submarine and military attacks to which regular Navy personnel was subject and received bars of recognition for his service in combat areas. Petitioner was not free to terminate his services without first applying for and obtaining permission and due relief and returning to authorized Naval officials the secret papers entrusted to him by the Navy (R. 19, 20, 22, 25).

Because of petitioner's over-age status his voluntary act to accept service with the Navy was similar to such service volunteered in the regular Navy (R. 20).

Petitioner appealed to the Commissioner of Patents for an extension of his letters patent No. 2068300 under Public Law 598, 81st Congress (2nd Session), 35 U. S. C. 115 (R. 2) which application the Commissioner of Patents in his decision of August 8, 1951, denied (R. 55, 56) on the ground, that the petitioner did not serve in the military or naval forces of the United States within the meaning of said Public Law 598 but that the service of petitioner was on ships of the Merchant Marine operating under the control of the United States Government.

Petitioner appealed to the United States Court of Customs and Patent Appeals (R. 1, 2) which Court, on March 18, 1952, affirmed the decision of the Commissioner of Patents (R. 67-74). Dissenting opinion (R. 74-81).

The honorable service of petitioner is unquestioned (R. 6A-6B, 7, 9, 10).

Specification of Errors.

The Court below erred:

In determining that Public Law 598 had no application to a person in the Merchant Marine, even though such person served in a combat zone on ships of the United States Navy, when such ships at the time were allocated to the United States Navy to carry military cargo and personnel for the account of the Navy.

Reasons for the Allowance of the Writ.

This is a case of first impression. There has been no judicial determination of Public Law 598, 81st Congress (2nd Session), 35 U. S. C. 115, other than in *In re Field,* 190 F. 2d 268 (Court of Customs and Patent Appeals), 1951, which did not concern the problem arising here.

The statute is remedial in its nature and is ambiguous, opinion below (R. 70), and therefore construction must be resorted to, to ascertain the intent of Congress.[1]

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[1] Public Law 598, 81st Congress (2nd Session), 35 U. S. C. 115, reads so far as is pertinent to this matter, as follows:

"Sec. 1. Any person who served honorably *in the military or naval forces of the United States* at any time between December 7, 1941, and September 2, 1945—

(a) who is the inventor or discoverer of an invention or discovery for which a patent was granted to him

[Footnote continued on following page.]

The legislative history of the Act yields no information which will adequately explain the language in question. The statute nowhere defines military or naval forces. The legislative history of the Act states only that it was for the benefit of the Veterans of World War II. The application of the statute to a

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[Footnote continued from preceding page.]

prior to September 2, 1945, the original term of which had not expired to said date and which is still owned by him, or who was prior to said date and continuously thereafter, the sole owner of a patent for an invention or discovery which had not expired prior to said date, and

(b) who, between December 7, 1941, and the date of the termination of his service but not later than the date of enactment of this Act, was not receiving income from said patent or patented invention or discovery; or whose income therefrom was substantially reduced as a result of his said service or because of the war, may obtain an extention of his patent for the term specified herein, upon application to the Commissioner of Patents within one year after the enactment of this Act and upon complying with the provisions of this Act. The period of extension of such patent shall be a further term from the expiration of the original term thereof equaling twice the length of the portion of his said service between the date of December 7, 1941 and September 2, 1945, during which his patent was in force."

The statute nowhere defines "military or naval forces", or otherwise specifies who is entitled to its benefits.

In *In re Field*, 190 F. 2d 268 (Court of Customs and Patent Appeals), 1951, the Court of Customs and Patent Appeals having Public Law 598 before it on another question said:

> "• • • there can be no doubt that the statute is remedial in its nature and if ambiguous it should be construed so as to favor those intended to be benefited."

person in the position of petitioner needs construction.[2]

Statutory construction should not lead to absurd

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[2] Opinion below (R. 70). U. S. Code Congressional Service, 81st Congress (2nd Session, 1950), page 2667:

> "The broad purpose of the bill is to provide for an extension of the life of patents issued to Veterans of World War II on the theory that their service would in many cases preclude them, in particular, to exploit their patents during that period."

50 App. U. S. C. 1305, relating to emergency and war shipping activities, reads so far as is material:

> "For purposes of this Act (sections 1301-1305 of this Appendix), the term 'veteran' means any person in the active military or naval service of the United States during the present war, or any person who served in the active military or naval service of the United States on or after September 16, 1940, and prior to the termination of the present war, and who has been discharged or released therefrom under honorable conditions, or any person who is or has been eligible to receive a certificate for substantially continuous service in the merchant marine as provided in the Act of June 23, 1943 (section 1471 of this Appendix). Apr. 29, 1943, c. 81, Sec. 5, as added Aug. 10, 1946, c. 948, 60 Stat. 976."

The Housing Administration in issuing Veterans Preference regulations pursuant to the Veterans Preference regulations under the Housing and Rent Act of 1947, Federal Register, July 6, 1950, page 4265, provides that the word "veteran" shall mean:

> "(1) A person who has served in the active military or naval forces of the United States on or after September 16, 1940, and also has been discharged or released therefrom under conditions other than dishonorable.
>
> * * * *
>
> (6) A person to whom the War Shipping Administration has issued a certificate of continuous service in the United States Merchant Marine * * *."

The Act of June 23, 1943, may be found in 50 App. U. S. 1471.

results.[3] It is respectfully submitted that one absurd result of the denial of the application of Public Law 598 to petitioner, is that petitioner would not for the purpose of the statute be held to be within the term "military or naval forces" while the Navy gun crew, which petitioner commanded, would themselves be considered as being within its terms.

In 50 App. U. S. C. 1305, the term "veteran" is defined to mean any person in the active military or

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[3] "We have refused to nullify statutes, however hard or unexpected the particular effect, where unambiguous language calls for a logical and sensible result. Any other construction would be properly condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd has long been a judicial function." *Armstrong Paint & V. Works* v. *Nu-Enamel Corp.*, 305 U. S. 315 (1939), page 333.

"The interpretation of the meaning of statutes as applied to justiciable controversies is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislature, has said." *U. S.* v. *American Trucking Associations*, 310 U. S. 534, page 544.

At pages 542-543, the Court in the *American Trucking Associations* case said:

"In the interpretation of statutes the function of the court is easily stated. It is to construe the language so as to give effect to the intent of Congress • • •.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves, to determine the purpose of the legislature. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the Act."

A legislative body "may be its own lexicographer and write its own definitions of words and terms". *Geer* v. *Birmingham*, 88 F. Supp. 189, cert. den. 340 U. S. 951.

naval service of the United States and includes any person who is or has been eligible to receive a certificate for substantially continuous service in the Merchant Marine.

The term "military or naval forces" is a generic description. For the purpose of the Act, a narrow construction should not be adopted. This term is broader and more inclusive than the term "military service" or "military or naval service". The Court below referred to one statute as appearing to lend some support to petitioner's contention. That is the Criminal Code, 18 U. S. C. 2387,[4] which defines the term "military or naval forces of the United States" as including officers of merchant vessels commissioned in the Navy or in the service of the Navy.

In some Acts Congress has particularly included definitions and specified services included.[5]

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[4] 18 U. S. C. 2387 includes in the term "military or naval forces of the United States" • • • "the Army of the United States, the Navy, Air Force, Marine Corps, Coast Guard, Naval Reserve, Marine Corps Reserve, and Coast Guard Reserve of the United States; and, when any merchant vessel is commissioned in the Navy or is in the service of the Army or the Navy, includes the master, officers and crew of such vessel."

[5] In 38 U. S. C. 424, the statute relating to pensions, bonuses and veterans relief states:

"• • • The term 'military or naval forces' means the Army, the Navy, the Marine Corps, the Coast Guard, the National Reserves, the National Naval Volunteers and any other branch of the United States Service while serving pursuant to law with the Army or the Navy."

In the *Internal Revenue Code*, 26 U. S. C. 3797, it is stated that the term "military or naval forces of the United States" includes, • • • "the Marine Corps, the Coast Guard, the Army

[Footnote continued on following page.]

While Congress is presumed to have used words in a statute in their usual and ordinary meaning (*Old Colony R. Co.* v. *Commissioner of Internal Revenue,* 284 U. S. 552, 560 (1932)), it is well settled that Congress may expressly give a term a definition which departs from its ordinary meaning. *Von Weise et al.* v. *Commissioner of Internal Revenue,* 69 F. 2d 439, C. A. 8th (1934).[6]

In *In re Field,* 190 F. 2d 268 (United States Court of Customs and Patent Appeals), 1951, the Court said in another connection that Public Law 598 was not ambiguous, while in the petitioner's case it said that it was ambiguous.[7]

[Footnote continued from preceding page.]

Nurse Corps, Female, The Women's Army Auxiliary Corps, the Navy Nurse Corps, Female, and the Women's Reserve Branch of the Naval Reserve."

The Soldier's and Sailor's Relief Act of 1940, 50 App. U. S. C. 511, in defining persons in the military service of the United States, states that it includes the following persons and no others:

> "• • • All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty with the Army or Navy. • • •"

In 50 App. U. S. C. 1472, members of the merchant marine were given civilian re-employment rights, and in 50 App. U. S. C. 754 they were given decorations for service.

[6] *Osbourne* v. *U. S.,* 164 F. 2d 767, held that merchant seamen were not entitled to protection of the *Soldier's and Sailor's Relief Act,* 50 App. U. S. C. 511. That Act defined persons in the military service to include those specified and no others.

[7] In *In re Field,* 190 F. 2d 268, page 271, the United States Court of Customs and Patent Appeals said:

> "It is elementary as has been stated many times by this and other courts, that when there is no doubt as to the meaning of terms, there is no necessity for construction where there is nothing of uncertainty or obscurity upon which ambiguity could be predicated."

Words may be used differently from their ordinary meaning.[8]

A narrow restricted construction such as obtained in *U. S.* v. *Germaine,* 99 U. S. 508 (1879), was not intended. That case involved a criminal statute. A specific question was whether a civil surgeon was an officer of the United States within the meaning of the Criminal Statute.

In *U. S.* v. *Mouat,* 124 U. S. 303 (1888), the Court applied a somewhat technical construction and was careful to distinguish the case from other cases where a more liberal interpretation of the word "officer" would be applied.[9]

In *U. S.* v. *Hendee,* 124 U. S. 309 (1888), the Court interpreted the word "officer" more broadly to carry

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[8] In the *Von Weise* case, *supra,* 69 F. 2d 439, at page 444, the Court said:

"One of the cardinal rules for construing statutes is that the words used are to be given their common ordinary meaning in the absence of indication in the statute or in the surrounding circumstances to the contrary; but if a definition of the word is given in the statute that definition is controlling."

[9] The Court said:

"Naturally Congress may have used the word 'Officer' in some other connections in a more popular sense as will be shown in the case of *U. S.* v. *Hendee* immediately following this in which case it would be the duty of the Court in construing such an Act of Congress to ascertain its true meaning and be governed accordingly."

"• • • like words may have one significance in one context and a different significance in another." *Porto Rico* v. *Rosaly y Castillo,* 227 U. S. 270, 275 (1913).

"When a court declares a statute is ambiguous it asserts that some of the words used may refer to several objects and the manner of their use does not disclose the particular object to which the word refers." Sutherland Statutory Construction, 3rd Edition, §4503.

out the intent of the Act and decided that a paymaster's clerk was an officer of the United States within the meaning of the particular statute.[10]

In *United States* v. *Hendee*, 124 U. S. 309, the Court asked: "If these officers are not ~~of~~ in the ~~military~~ naval service, it may well be asked who are".

I respectfully submit that under the broad generic meaning of the term naval forces which is broader than the term military service there is scant authority for denying the application of the petitioner who in rendering a war service took his ship into combat zones and earned combat bars, had a Navy Lieutenant and regular Navy crews under his command, who swore to the oath the Coast Guard officers took, who wore the prescribed uniform protected by statute, who had

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[10] "The place of paymaster's clerk is an important one in the machinery of the Navy. Their appointment must be approved by the Commander of the Ship. Their acceptance and agreement to submit to laws and regulations for the government and discipline of the Navy must be in writing and filed in the Department. They must take oaths and bind themselves to serve until discharged."

"The discharge must be by the appointing power and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the payroll, and are paid accordingly. They must also become entitled to a pension and to bounty land * * *. If these officers are not in the Naval service, it may well be asked who are."

The term "military or naval forces" is not a proper (capitalized) name but generic for the purpose of the Act.

The opinion of the Assistant Comptroller of the United States, 24 Decisions of the Comptroller General 344, held that under Section 212 of the Economy Act of June 30, 1932, 47 Stat. 406 (5 U. S. C. 59a) a retired engineer of a ship operated for the War Shipping Administration was not entitled for the period of his incumbency to pay as a retired commissioned officer in excess of a certain amount.

all the re-employment rights accorded members of the military forces, who was subject to disciplinary control on a vessel under military orders and who finally had confidential papers which he could show or deliver to no one except to authorized supervisory Naval personnel.

Conclusion.

The decision below was by a majority opinion with four judges concurring therein and one judge dissenting with a vigorous dissenting opinion.

The petitioner submits that the questions here presented, the ambiguity of the statute as applied to petitioner, the absurd results (it is respectfully submitted) of the decision below and the matter not having heretofore been directly before this Court, should be considered and passed upon by this Court, and for that purpose the petitioner prays that his application be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 130

JAMES V. MARTIN, PETITIONER

v.

JOHN A. MARZALL, COMMISSIONER OF PATENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion and dissenting opinion in the Court of Customs and Patent Appeals (R. 67-81) are reported at 195 F. 2d 303.

JURISDICTION

The decision of the Court of Customs and Patent Appeals (R. 82) was entered on March 18, 1952.

The petition for a writ of certiorari was filed on June 16, 1952. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether this Court has jurisdiction to issue a writ of certiorari to review a decision of the Court of Customs and Patent Appeals affirming the respondent's denial of an application for extension of the term of a patent.

STATUTES INVOLVED

The pertinent parts of the statutes involved are set forth in the Appendix, *infra*, pp. 9-10. See also footnote 1, *infra*.

STATEMENT

Petitioner applied to the Commissioner of Patents for an extension of the term of Patent No. 2068300, pursuant to the provisions of the Act of June 30, 1950, Public Law 598, 81st Congress, 2d Session (35 U.S.C. (Supp. IV) 115 *et seq.*), which permits patentees who were deprived of the opportunity to exploit their patents by reason of service in "the military or naval forces" during the war to obtain extensions of the life of their patents.[1] Peti-

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[1] Section 1 of the Act of June 30, 1950, Public Law 598 provides as follows:

> Any person who served honorably in the military or naval forces of the United States at any time between December 7, 1941, and September 2, 1945—
>
> (a) who is the inventor or discoverer of an invention or discovery for which a patent was granted to him prior to September 2, 1945, the original term of which had not expired prior to said date and which is still owned by

tioner had served in the Maritime Service of the United States, as first mate, first officer, and master of merchant vessels owned by the War Shipping Administration and allocated to the Navy for the purpose of transporting cargo and personnel in the Pacific. The Commissioner rejected the application on the ground that petitioner's service in the merchant marine was not to be regarded as service in "the military or naval forces." Pursuant to the statute, petitioner appealed to the Court of Customs and Patent Appeals, under R.S. 4914, *infra*, p. 10); and that court, one judge dissenting, affirmed.

ARGUMENT

We think that the judgment of the court below is correct and would not in any event warrant review by this Court.[2] At the threshold, however, we think

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him, or who was prior to said date and continuously thereafter the sole owner of a patent for an invention or discovery which had not expired prior to said date; and

(b) who, between December 7, 1941, and the date of the termination of his service but not later than the date of enactment of this Act, was not receiving income from said patent or patented invention or discovery; or whose income therefrom was substantially reduced as a result of his said service or because of the war, may obtain an extension of his patent for the term specified herein, upon application to the Commissioner of Patents within one year after the enactment of this Act and upon complying with the provisions of this Act. The period of extension of such patent shall be a further term from the expiration of the original term thereof equaling twice the length of the portion of his said service between the dates of December 7, 1941, and September 2, 1945, during which his patent was in force.

[2] The Court below relied, correctly we think, on definitions of the term "military and naval forces" contained in related statutes. These include statutes in which Congress has provided for the preservation in the civilian *status quo* of various

that this Court is without jurisdiction to review decisions of the Court of Customs and Patent Appeals in patent or trademark cases. The reasons for our view have been set forth in detail in the respondents' Briefs in Opposition in *Dalton & Cooley* v. *Marzall,* No. 87, October Term 1951, certiorari denied, 342 U. S. 818, and *Thompson* v. *Learned,* No. 496, October Term 1951, certiorari denied, 342 U. S. 942, and in the respondent's Memorandum in *Shackell* v. *Marzall,* No. 763, October Term 1951, certiorari denied June 9, 1952, to all of which the Court is respectfully referred. In outline, the argument is as follows:—

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other rights of persons serving in the armed forces, such as the Soldiers and Sailors Relief Act of 1940, 54 Stat. 1179, 50 U.S.C. App. 511, in which the term "military and naval forces" is defined to exclude persons in the merchant marine, and also various statutes in which Congress conferred veterans' benefits on officers and members of crews employed by the War Shipping Administration, but made no reference to their rights as patentees. Act of March 24, 1943, c. 26, 57 Stat. 45. Cf. *Osbourne* v. *United States,* 164 F. 2d 767 (C.A. 2). It is also significant that the House subcommittee holding hearings on the bill that became P.L. 598, the Act here in question, considered and rejected a proposal to extend the law's benefits to all patentees whose exploitation of their patents suffered because of wartime shortages of materials or for other reasons. The bill was purposely limited to veterans, whose military service removed them "from the scenes of their livelihoods and occupations." S. Rept. No. 1190, 81st Cong., 1st Sess., p. 2. Any extension of the Act to merchant seamen, whose war service was in pursuit of their occupation, would be contrary to this legislative purpose.

Also, we think that the present case is of minor importance. The period for applying under the present law for extensions of the life of patents has expired. Petitioner is the only member of the merchant marine who has attempted to avail himself of the law. Only 160 applications from veterans of all branches of the armed services were received by the Commissioner under this law.

It was settled by *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, that decisions of the Court of Appeals of the District of Columbia on appeals from decisions of the Patent Office in patent and trademark applications were not reviewable by this Court. Such a decision was held to be not a judicial judgment but "merely an instruction * * * by a court which is made part of the machinery of the Patent Office for administrative purposes." 272 U. S. at 698-699. Hence such a decision was not a justiciable case or controversy and was beyond the constitutional power of this Court to review.

After the *Postum Cereal* case, jurisdiction of appeals from the Patent Office in patent and trademark matters under R. S. 4911-4914 was transferred from the Court of Appeals for the District of Columbia to the Court of Customs and Patent Appeals, until then named the Court of Customs Appeals.[3] Act of March 2, 1929, c. 488, 45 Stat. 1475, *infra*, p. 9. After the transfer of this jurisdiction to the Court of Customs and Patent Appeals, this Court, in denying certiorari for want of jurisdiction in *Pacific Northwest Canning Co.* v. *Skookum Packers' Ass'n*, 283 U. S. 858 (trademark

[3] Appeals from rejections of applications for extensions under the law here in question are governed by the same provisions that apply to appeals from denials of applications for patents in the ordinary case. Section 3 of P.L. 598 provides in part: "Where an extension is refused the applicant therefor shall have the same remedy by appeal from the decision of the Commissioner to the United States Court of Customs and Patent Appeals as is now provided by law where an applicant for patent is dissatisfied with the decision of the Patent Office Board of Appeals." 35 U.S.C. (Supp. IV) 117.

case), and *McBride* v. *Teeple*, 311 U. S. 649 (patent case), cited the *Postum Cereal* case as authority for its denial of the writs, thus affirming its prior holding that it has no jurisdiction to review decisions on appeals from Patent Office determinations in patent and trademark matters.

Petitioner invokes 28 U.S.C. 1256, *infra*, p. 9, but that section does not confer jurisdiction on this Court, although its language is broad enough to do so. The *Postum Cereal* decision was based on constitutional grounds, and no statute could confer a jurisdiction withheld by the Constitution. But we think also that 28 U.S.C. 1256 was not intended to confer jurisdiction on this Court in cases like the present.

That section is part of the Act of June 25, 1948, 62 Stat. 869, codifying into law Title 28 of the United States Code. Before that Act, the only statutory provision authorizing this Court to review decisions of the Court of Customs and Patent Appeals was a provision relating to customs cases.[4] This was Section 195 of the old Judicial Code as amended.[5] Sec-

[4] Summary appeals (such as that in the present case) in patent and trademark matters are to be distinguished from appeals from judgments of the United States Customs Court in customs cases. The latter are judicial in character and are reviewable by this Court. *E.g.*, *Barr* v. *United States*, 324 U.S. 83; *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48. The Court of Customs and Patent Appeals may properly be given jurisdiction over both justiciable and non-justiciable matters. *Ex parte Bakelite Corp.*, 279 U.S. 438.

[5] Section 195 was amended by the Act of August 22, 1914, 38 Stat. 703, and by Section 647 of the Tariff Act of 1930, 46 Stat. 590, 762, 28 U.S.C. (1946 ed.) 308.

tion 195 combined two provisions: one empowering the Court of Customs and Patent Appeals to hear appeals from the Customs Court—in customs cases—and a second authorizing this Court to review such decisions. It did not refer to patent or trademark matters. The codification of Title 28 merely separated the foregoing two provisions, placing the former in 28 U.S.C. 1541 and the latter in 28 U.S.C. 1256. Nothing in the codifying act of 1948 or in its history suggests that Congress had any intention of giving this Court power to review a class of cases over which jurisdiction had previously been withheld or to diminish the ambit of the *Postum Cereal* case.[6]

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[6] Applicants for patents have available to them at their own option an alternative path of review of adverse decisions of the Patent Office. They may proceed by suit in equity under R.S. 4915 (35 U.S.C. 63) in the district courts. In such cases the courts of appeals have jurisdiction on appeal and this Court has jurisdiction to review by writ of certiorari. Cf. *Hoover Co.* v. *Coe*, 325 U.S. 79. It is not clear that this alternative remedy is available in cases like the present, but this does not affect the question of this Court's jurisdiction. See *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 701.

CONCLUSION

For the foregoing reasons and for the reasons stated in the respondents' Briefs in Opposition in *Dalton & Cooley* v. *Marzall, supra,* and in *Thompson* v. *Learned, supra,* the petition for a writ of certiorari should be denied.

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JULY, 1952.

APPENDIX

Act of March 2, 1929, c. 488, 45 Stat. 1475-1476:

That the title of the United States Court of Customs Appeals, created by the Act approved August 5, 1909, is hereby changed to the United States Court of Customs and Patent Appeals.

Sec. 2(a) The jurisdiction now vested in the Court of Appeals of the District of Columbia in respect of appeals from the Patent Office in patent and trade-mark cases is vested in the United States Court of Customs and Patent Appeals.

28 U.S.C. 1256:

Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari.

R.S. 4911, as amended, 44 Stat. 1336, 45 Stat. 1476, 53 Stat. 1212, 35 U.S.C. 59a:

Sec. 4911. If any applicant is dissatisfied with the decision of the board of appeals, he may appeal to the United States Court of Customs and Patent Appeals, in which case he waives his right to proceed under section 4915 of the Revised Statutes. If any party to an interference is dissatisfied with the decision of the board of interference examiners, he may appeal to the United States Court of Customs and Patent Appeals, provided that such appeal shall be dismissed if any adverse party to such interference shall, within twenty days after the appellant shall have filed notice of appeal ac-

cording to section 4912 of the Revised Statutes, file notice with the Commissioner of Patents that he elects to have all further proceedings conducted as provided in section 4915 of the Revised Statutes. Thereupon the appellant shall have thirty days thereafter within which to file a bill of equity under said section 4915, in default of which the decisions appealed from shall govern the further proceedings in the case.

R.S. 4914, 35 U.S.C. 62:

The court [Court of Customs and Patent Appeals], on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.

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